The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts the amendment to §101.222.

The amendment to §101.222 is adopted *with change* to the proposed text as published in the July 22, 2016, issue of the *Texas Register* (41 TexReg 5343) and will be republished.

The adoption of §101.222(k) and (l) will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the State Implementation Plan (SIP).

**Background and Summary of the Factual Basis for the Adopted Rule**

*Texas' Rules*

In 2003, TCEQ established an affirmative defense rule for "certain emissions events." The rule sets forth criteria that incentivize good operation and maintenance practices to minimize or avoid excess emissions and, if met, allow an owner or operator to avail itself of the affirmative defense.

The affirmative defense in §101.222(b) - (e) is available only for certain types of excess emissions, specifically from non-excessive upset events and unplanned maintenance, startup, and shutdown (MSS) activities. To be eligible for the affirmative defense, these events must have been unplanned and unavoidable, and properly reported.

The affirmative defense rules were last amended in 2005 and approved by EPA in 2010 (75 FR 68989 (November 10, 2010)). When EPA approved the Texas affirmative defense criteria as part of the Texas SIP in 2010, EPA acknowledged that there may be times when a source may not be able to meet emission limitations during periods of startup, shutdown, or malfunction (SSM). In this approval, EPA referenced its 1999 policy, stating "in the course of an enforcement action for penalties, a source could assert the affirmative defense and the burden would be on the source to prove enumerated factors, including that the period of excess emissions was minimized to the extent practicable and that the emissions were not due to faulty operations or disrepair of equipment."

EPA defended its 2010 SIP approval of §101.222(b) - (e) when this approval was challenged, and ultimately upheld by the United States Circuit Court of Appeals for the Fifth Circuit (Fifth Circuit) in 2013. (*Luminant Generation Co. LLC v. EPA*, 714 F.3d 841 (5th Cir. 2013))

*Petition to EPA*

On June 30, 2011, Sierra Club filed a petition for rulemaking with the EPA Administrator regarding, among other things, how state and local air agencies' rules in EPA-approved SIPs treat excess emissions during periods of SSM. In response, on February 12, 2013, EPA proposed its finding that numerous SIPs across the country were approved with "broad and loosely defined provisions to control excess emissions." Although Texas was not included in the Sierra Club's petition nor subject

to the 2013 proposal, on September 17, 2014 (79 FR 55945), EPA supplemented its original proposal to add the Texas SIP, specifically finding that §101.222(b) - (e) is substantially inadequate to meet Federal Clean Air Act (FCAA) requirements, and adopted this position in its final rulemaking. On June 12, 2015, EPA published its final action on the petition (80 FR 33839). In that notice, EPA stated it was clarifying, restating, and revising its guidance concerning its interpretation of the FCAA requirements with respect to treatment in SIPs of excess emissions during periods of SSM.

Specifically, EPA rescinded its interpretation that the FCAA allows states to elect to create narrowly tailored affirmative defense provisions in SIPs. Instead, EPA promulgated its new interpretation of the FCAA as prohibiting affirmative defense provisions in SIPs based on EPA's conclusion that the enforcement structure in FCAA, §113 and §304 precludes any affirmative defense provisions that would operate to limit a court's jurisdiction or discretion to determine the appropriate remedy in an enforcement action. As a result, in the final rule, EPA issued a SIP Call for 36 states, including Texas, finding that certain SIP provisions regarding excess emissions due to SSM are substantially inadequate to meet FCAA requirements and established a due date of November 22, 2016, for submittal of SIP revisions to address this finding. EPA based its final rule position on the decision in *NRDC v. EPA*, 749 F.3d (District of Columbia Circuit (D.C. Circuit) 2014), regarding an EPA National Emission Standards for Hazardous Air Pollutants rule.

*TCEQ's Response to EPA's SSM SIP Call*

The commission disagrees with EPA's interpretation that an affirmative defense as to penalties is not available for enforcement of SIP violations. EPA's SSM SIP Call has been challenged, and is pending in the United States Court of Appeals for the District of Columbia (D.C. Circuit), by the State of Texas, TCEQ, several Texas industry groups, 18 other states, approximately 23 industry groups and trade associations, and several electric generating companies. Five environmental groups have intervened on behalf of EPA.

While the commission's rule adoption is not removing its affirmative defense rule from the Texas SIP, the commission is adding §102.222(k) to address EPA's SSM SIP Call. EPA's SSM SIP Call states, "the EPA has now concluded that the enforcement structure of the (f)CAA, embodied in section 113 and section 304, precludes any affirmative defense provisions that would operate to limit a court's jurisdiction or discretion to determine the appropriate remedy in an enforcement action." (80 FR 33851 (June 12, 2015)) Because adopted §101.222(k) clarifies that the section does not operate to limit a court's jurisdiction, it directly responds to and satisfies EPA's SSM SIP Call with regard to Texas.

Adopted subsection (l) provides that adopted subsection (k) will not be applicable until all appeals regarding the EPA's SSM SIP Call, as it applies to §101.222(b) - (e), have ended and there is a final and non-appealable court decision that upholds the EPA's

SSM SIP Call.

Subsections (k) and (l) are not severable and are adopted to be submitted to EPA for approval of both subsections as part of the Texas SIP.

**Section Discussion**

*§101.222, Demonstrations*

Adopted §101.222(k) states that the use of the affirmative defenses in subsections (b) - (e) are not intended to limit a federal court's jurisdiction or discretion to determine the appropriate remedy in an enforcement action.

Adopted §101.222(l) delays the applicability of §101.222(k) until all appeals regarding the EPA's SSM SIP Call, as it applies to §101.222(b) and (e), have ended and there is a final and nonappealable court decision that upholds the EPA's SSM SIP Call.

The commission is not adopting and does not intend to amend or remove subsections (a) - (j) and, therefore, did not solicit comment on those subsections. The references to "the effective date of this section" in subsection (h) was adopted by the commission on December 14, 2005, and because those deadlines have expired, the commission is not extending those deadlines with the new effective date of the rule due to the addition of subsections (k) and (l).

**Final Regulatory Impact Analysis Determination**

The commission reviewed the adopted rulemaking in light of the regulatory impact analysis (RIA) requirements of Texas Government Code, §2001.0225, and determined that the rulemaking does not meet the definition of a "major environmental rule" as defined in that statute, and in addition, if it did meet the definition, would not be subject to the requirement to prepare an RIA.

A major environmental rule means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The specific intent of the adopted rule is to respond to the EPA's SSM SIP Call by adding new text to explain that the use of the affirmative defenses in §101.222(b) - (e) are not intended to limit a federal court's jurisdiction or discretion to determine the appropriate remedy in an enforcement action, with delayed applicability until completion of the litigation and a final and non-appealable court decision that upholds the EPA's SSM SIP Call.

Additionally, even if the rule met the definition of a "major environmental rule," the rulemaking does not meet any of the four applicability criteria for requiring an RIA for a major environmental rule, which are listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225, applies only to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law,

unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The adopted rule would implement requirements of the FCAA. Under 42 United States Code (USC), §7410, each state is required to adopt and implement a SIP containing adequate provisions to implement, attain, maintain, and enforce the National Ambient Air Quality Standards (NAAQS) within the state. While 42 USC, §7410, generally does not require specific programs, methods, or emission reductions in order to meet the standard, state SIPs must include specific requirements as specified by 42 USC, §7410. The provisions of the FCAA recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though the FCAA allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of 42 USC, §7410. States are not free to ignore the requirements of 42 USC, §7410, and must develop programs to assure that their SIPs provide for implementation, attainment, maintenance, and enforcement of the NAAQS within the state. The specific intent of the adopted rule is to respond to the EPA's SSM SIP Call by adding new text to explain

that the use of the affirmative defenses in §101.222(b) - (e) is not intended to limit a federal court's jurisdiction or discretion to determine the appropriate remedy in an enforcement action, with delayed applicability until completion of the litigation and a final and non-appealable court decision that upholds the EPA's SSM SIP Call.

The requirement to provide a fiscal analysis of regulations in the Texas Government Code was amended by Senate Bill 633 (SB 633 or bill) during the 75th Texas Legislature, 1997. The intent of SB 633 was to require agencies to conduct an RIA of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded, "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted rules from the full RIA unless the rule was a major environmental rule that exceeds a federal law. Because of the ongoing need to meet federal requirements, the commission routinely proposes and adopts rules incorporating or designed to satisfy specific federal requirements. The legislature is presumed to understand this federal scheme. If each rule proposed by the commission to meet a federal requirement was considered

to be a major environmental rule that exceeds federal law, then each of those rules would require the RIA contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board in its fiscal notes. The commission contends that the intent of SB 633 was only to require the full RIA for rules that are extraordinary in nature. While the adopted rule may have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA and, in fact, creates no additional impacts since the adopted rule does not exceed the requirement to attain and maintain the NAAQS. For these reasons, the adopted rule falls under the exception in Texas Government Code, §2001.0225(a), because it is required by, and does not exceed, federal law.

The commission consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature revised the Texas Government Code, but left this provision substantially unamended. It is presumed that "when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation." (*Central Power & Light Co. v. Sharp*, 919 S.W.2d 485, 489 (Tex. App. Austin 1995), *writ denied with per curiam opinion respecting another issue*, 960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.*, 798 S.W.2d 353, 357 (Tex. App. Austin 1990, *no writ*); *Cf. Humble Oil & Refining Co. v. Calvert*, 414 S.W.2d 172 (Tex. 1967); *Dudney v. State Farm Mut. Auto Ins. Co.*, 9 S.W.3d 884, 893 (Tex. App. Austin 2000); *Southwestern Life Ins. Co. v. Montemayor*, 24 S.W.3d 581 (Tex. App.

Austin 2000, *pet. denied*); and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.*, 563 S.W.2d 916 (Tex. 1978))

The commission's interpretation of the RIA requirements is also supported by a change made to the Texas Administrative Procedure Act (APA) by the legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the legislature clarified that state agencies are required to meet these sections of the APA against the standard of "substantial compliance" (Texas Government Code, §2001.035). The legislature specifically identified Texas Government Code, §2001.0225, as falling under this standard. As discussed in this analysis and elsewhere in this preamble, the commission substantially complied with the requirements of Texas Government Code, §2001.0225.

The specific intent of the adopted rule is to respond to the EPA's SSM SIP Call by adding new text to explain that the use of the affirmative defenses in §101.222(b) - (e) are not intended to limit a federal court's jurisdiction or discretion to determine the appropriate remedy in an enforcement action, with delayed applicability until completion of the litigation and a final and non-appealable court decision that upholds the EPA's SSM SIP Call. The adopted rule was not developed solely under the general powers of the agency, but is authorized by specific sections of Texas Health and Safety Code, Chapter 382 (also known as the Texas Clean Air Act (TCAA)), and the Texas Water Code, which are cited in the Statutory Authority section of this preamble. Therefore, this adopted rulemaking action is not subject to the regulatory analysis

provisions of Texas Government Code, §2001.0225(b).

The commission invited public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period. No comments were received on the RIA determination.

**Takings Impact Assessment**

Under Texas Government Code, §2007.002(5), taking means a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or the Texas Constitution, §17 or §19, Article I or restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and is the producing cause of a reduction of at least 25% in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

The commission completed a takings impact analysis for the adopted rulemaking action under Texas Government Code, §2007.043. The primary purpose of this adopted rulemaking action, as discussed elsewhere in this preamble, is to respond to the EPA's SSM SIP Call by adding new text to explain that the use of the affirmative defenses in §101.222(b) - (e) are not intended to limit a federal court's jurisdiction or

discretion to determine the appropriate remedy in an enforcement action, with delayed applicability until completion of the litigation and a final and non-appealable court decision that upholds the EPA's SSM SIP Call. The adopted rule does not create any additional burden on private real property. The adopted rule does not affect private real property in a manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution. The adoption does not affect private real property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the governmental action. Therefore, the adopted rulemaking does not cause a taking under Texas Government Code, Chapter 2007.

**Consistency with the Coastal Management Program**

The commission determined that this rulemaking action relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201, *et seq.*), and commission rules in 30 TAC Chapter 281, relating to Applications Processing, Subchapter B. As required by §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Coastal Management Program, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Advisory Committee and determined that the action is consistent with the applicable CMP goals and policies.

The CMP goal applicable to this adopted rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(1)). The adopted rule complies with this goal by ensuring that the rule meets applicable federal and state requirements for regulation of air quality in these areas. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with federal regulations in 40 Code of Federal Regulations (CFR), to protect and enhance air quality in the coastal areas (31 TAC §501.32). Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking action is consistent with CMP goals and policies.

The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments were received on the CMP.

**Effect on Sites Subject to the Federal Operating Permits Program**

Section 101.222 is an applicable requirement under 30 TAC Chapter 122, Federal Operating Permits Program. Owners or operators subject to the federal operating permit program must revise their operating permit consistent with the revision process in Chapter 122, upon the effective date of the adopted rulemaking.

**Public Comment**

The commission held a public hearing on August 8, 2016. The comment period closed on August 8, 2016. The commission received comments from Association of Electric

Companies of Texas (AECT), Environment Texas and Lone Star Chapter of the Sierra Club (Environment Texas and LSCSC), Environmental Integrity Project (EIP), EPA, Luminant, Sierra Club, Texas Chemical Council (TCC), Texas Industry Project (TIP), and Texas Oil & Gas Association (TXOGA).

**Response to Comments**

*General Comments Regarding §101.222*

*Comment*

AECT commented that it strongly supports the affirmative defenses in §101.222(b) - (e) for upsets or unplanned MSS activities, because the affirmative defenses are necessary and critical to the air quality regulatory program in Texas. TCEQ's affirmative defenses establish stringent criteria that incent operational and maintenance practices that help minimize and avoid emissions from upsets and unplanned MSS activities. These affirmative defenses were developed at EPA's request and were approved as part of the Texas SIP. Therefore, AECT, strongly supports retaining the affirmative defenses as proposed.

***Response***

**The commission agrees that the stringent criteria of the affirmative defense incentivize good operational and maintenance practices. EPA's comments in response to this rulemaking also acknowledge that the TCEQ's affirmative defenses are "narrowly drawn," thus supporting the TCEQ's position that these affirmative defenses are appropriate for minimizing adverse impacts from emissions.**

**TCEQ continues to maintain that an affirmative defense is appropriate for violations that are excess emissions due to emissions events (which are upsets and unscheduled MSS activities); unplanned MSS activities; opacity events; and opacity events resulting from unplanned MSS activities, as long as the criteria for an affirmative defense are rigorous and narrowly tailored for consistent and meaningful enforcement while protecting air quality, as are those in TCEQ's affirmative defense rule.**

*Comment*

TXOGA commented that the TCEQ has an extensive base of experience applying EPA- and court-approved criteria to evaluate these unavoidable air emissions, and the regulated community likewise understands the framework and its obligations under this program. TXOGA is supportive of the TCEQ's efforts in the rule proposal to uphold the law as it specifically applies to Texas.

***Response***

**The commission appreciates the support and agrees that with more than ten years of applying these particular criteria, TCEQ's experience is extensive. TCEQ consistently pursues administrative, as well as civil, enforcement against non-compliant regulated industries in accordance with a vigorous, clearly articulated regulatory framework. Texas does not allow industries to release excess amounts of air pollution when equipment breaks down and when facilities undergo**

**maintenance work. Rather, TCEQ has a multifaceted approach to minimize emissions. Scheduling MSS activities in an expedited manner prevents greater emissions from malfunctions in the future. For upsets (malfunctions), these must be unavoidable to be eligible for an affirmative defense.**

*Use of Affirmative Defense*

*Comment*

TCC commented that the proposed rule does not alter or restrict the authority of federal courts to impose liability, and that the Fifth Circuit agrees with this position.

***Response***

**The commission agrees that §101.222(k) addresses EPA's concern. In its final rulemaking for the SSM SIP Call, the EPA "concluded that the enforcement structure of the (F)CAA, embodied in section 113 and section 304, precludes any affirmative defense provisions that would operate to limit a court's jurisdiction or discretion to determine the appropriate remedy in an enforcement action." (80 FR 88339, 88351(June 12, 2015)). Because adopted §101.222(k) clarifies that the section does not operate to limit a court's jurisdiction, it directly responds to and satisfies EPA's SSM SIP Call with regard to Texas. Further, the commission agrees that the Fifth Circuit agrees with this position. (*Luminant Generation Co. LLC v. EPA,* 714 F.3d 841 (5th Cir. 2013))**

*Comment*

TCC commented that the current Texas affirmative defenses for excess emissions due to unplanned MSS activities, upsets, or excess opacity events resulting from upsets or MSS activities are federally enforceable and operative in federal district court. TCC will continue to support TCEQ's efforts to uphold the current case law as it specifically applies to Texas through this rule proposal.

***Response***

**The commission agrees that the affirmative defense rule is federally enforceable as an applicable requirement in the Title V program, and as part of the SIP. To the extent which some have argued that a court or an administering permit authority did not have discretion to allow an affirmative defense, enforcement discretion and use of an affirmative defense remains within their authority, which is appropriate under FCAA, §113 and §304, as well as separation of powers principles. In *Luminant Generation Co. LLC v. EPA*, the Fifth Circuit held, contrary to EPA's new finding, that affirmative defenses do not "negate the district court's jurisdiction to assess civil penalties using the criteria outlined in section 7413(e), or the state permitting authority's power to recover civil penalties." (*Luminant Generation Co. LLC v. EPA*, 714 F.3d 841, 853 n. 9 (5th Cir. 2013))**

*Comment*

Environment Texas and LSCSC, EIP, and the Sierra Club commented that the substantive questions regarding the availability of an affirmative defense for violations resulting from upsets has been largely resolved by federal courts, and by EPA's revised

policy. The commenters noted that while the affirmative defense applied only to penalties and not to injunctive relief, nothing in TCEQ's rules trumps the wide discretion that federal courts have to adjudicate federal actions.

***Response***

**The commission does not agree that the availability of an affirmative defense for violations resulting from upsets has largely been resolved by federal courts and by EPA's revised policy with regard to use of affirmative defense for excess emissions from limits in a state's SIP. Rather, EPA erroneously applied the opinion of the D.C. Circuit stating that EPA could not include an affirmative defense in its Portland Cement National Emission Standards for Hazardous Air Pollutants (NESHAP) rules, which specifically noted that the opinion was not a determination for violations of SIP limits under FCAA, §110, referencing the *Luminant Generation Co. LLC v. EPA* opinion. (*NRDC v. EPA*, 749 F.3d 1055, 1064, n.2 (D.C. Circuit 2014))**

**The commission agrees that the TCEQ's current affirmative defense rule does not apply to administrative technical orders and actions for injunctive relief. TCEQ has not and does not dispute that the federal courts have the discretion and authority to allow an affirmative defense, and that is appropriate under FCAA, §113 and §304, as well as under separation of powers principles.**

**In *Luminant Generation Co. LLC v. EPA*, the Fifth Circuit held, contrary to EPA's**

**new finding, that affirmative defenses do not "negate the district court's jurisdiction to assess civil penalties using the criteria outlined in section 7413(e), or the state permitting authority's power to recover civil penalties." (*Luminant Generation Co. LLC v. EPA*, 714 F.3d 841, 853 n. 9 (5th Cir. 2013)) In the *Luminant Generation Co. LLC v. EPA* case, TCEQ's amicus curie brief stated that, as EPA recognized in its approval of TCEQ's affirmative defense rule, "...it is the court that determines whether an operator has proved its affirmative defense. And if not, it is the court that determines the amount of the penalty. 75 Fed. Reg. at 68999 ('(I)f the affirmative defense is rejected by the court, a judge is still required to determine the appropriate penalties in a given case.'). Thus, the availability of the affirmative defense in certain limited cases does not tread on the courts' jurisdiction to determine-consistent with EPA's interpretation of the Act and the special regime for MSS emissions-whether a penalty is appropriate, and, if so, to determine the appropriate amount of that penalty. Accordingly, the approved affirmative defense rules are entirely consistent with the Clean Air Act's enforcement and penalty assessment criteria."**

*Comment*

Environment Texas and LSCSC, EIP, and Sierra Club commented that violations of the FCAA are subject to federal civil judicial enforcement actions and citizen suits and that, in such suits, federal district courts have jurisdiction to assess penalties for each violation. Commenters noted that, specifically, FCAA, §113(e) lists the criteria the

district court must consider in assessing penalties, and because assessing penalties is expressly reserved to the federal district courts, neither EPA nor the states have the authority under the FCAA to alter the jurisdiction of federal courts by adopting rules limiting the district courts' penalty assessment authority. They further commented that the D.C. Circuit agreed with this reasoning, holding that an affirmative defense for private civil suits exceeds EPA's statutory authority because, under FCAA, §113(e)(1) and §304(a), the decision whether to award penalties is for a court, citing *NRDC v. EPA*, 749 F.3d 1055 (D.C. Circuit 2014). The commenters noted that they agreed with EPA that the reasoning of this opinion applies squarely to the question of whether the FCAA allows states to establish affirmative defenses in their regulations through the SIP process.

***Response***

**The commission agrees that FCAA violations are subject to enforcement actions by EPA and citizens in federal district court.**

**The current affirmative defense criteria are used by the TCEQ in making its own enforcement decisions and were never intended to restrict the authority of federal courts. The commission does not agree that the *NRDC v. EPA* opinion applies to affirmative defenses in SIPs. The D.C. Circuit held that EPA improperly allowed an affirmative defense in its Portland Cement NESHAP rule. The court specifically noted that the opinion was not a determination for violations of SIP limits under FCAA, §110, referencing the Fifth Circuit's *Luminant Generation Co. LLC v. EPA***

**opinion. (*NRDC v. EPA*, 749 F.3d 1055, 1064, n.2 (D.C. Circuit 2014)) Further, EPA's revised policy is not consistent with the opinion of the Fifth Circuit, which held that TCEQ's affirmative defenses are and were never intended to bind a federal court.**

*Comment*

AECT commented that any comments suggesting that the affirmative defenses in §101.222(b) - (e) interfere with the rights of citizens, such as environmental groups, to pursue enforcement under the citizen suit provision of FCAA, §304 are baseless because AECT is aware of at least four instances in the last few years in which environmental groups were allowed to pursue citizen suits against Texas companies based on alleged upsets or unplanned MSS activities (including at least two suits that continued through trial).

AECT further commented that a defendant company's claim of an affirmative defense does not place any additional burden on an environmental group plaintiff in a citizen suit because it is clear that the defendant company carries the burden to demonstrate that all of the conditions of the claimed affirmative defense are met, citing *Luminant Generation Co. LLC v. EPA*, 714 F.3d 841, 855 (5th Cir. 2013); and, went on to comment that even when a defendant company claims one of the affirmative defenses in §101.222(b) - (e) in a citizen suit (or an EPA enforcement action in federal district court), the court has the ability to determine whether each of the stringent conditions of the affirmative defense is met. The commenter also noted that if the court determines that any one of those conditions is not met, the court should reject the

affirmative defense claim.

***Response***

**The commission agrees that a party asserting an affirmative defense has the burden of proving to the court that it has met all of the elements of the defense. (*Luminant Generation Co. LLC v. EPA*, 714 F.3d 841, 853 n. 9 (5th Cir. 2013)) To the extent which some have argued that a court or an administering permit authority did not have discretion to allow an affirmative defense, enforcement discretion and use of an affirmative defense remains within their authority, which is appropriate under FCAA, §113 and §304, as well as separation of powers principles. In *Luminant Generation Co. LLC v. EPA* the Fifth Circuit held, contrary to EPA's new finding, that affirmative defenses do not "negate the district court's jurisdiction to assess civil penalties using the criteria outlined in section 7413(e), or the state permitting authority's power to recover civil penalties." (*Luminant Generation Co. LLC v. EPA*, 714 F.3d 841, 853 n. 9 (5th Cir. 2013))**

*Comment*

Environment Texas and LSCSC, EIP, and Sierra Club commented that while it appeared clear to EPA and to the Fifth Circuit that the TCEQ's affirmative defense rules are limited to penalties and would not thwart citizen enforcement, TCEQ's practices allow industries to treat the narrow defense to penalties as a blanket exemption. The commenters noted that in practice, as long as a Texas source reports the excess emissions, state regulators typically "determine," without on-site investigations, that all

of the affirmative defense criteria are met and that, therefore, there were "no violations." The commenters noted that in doing so, the State has effectively, and improperly, treated the affirmative defense as a blanket exemption. In addition, the commenters noted that the affirmative defense as it currently exists is also subject to misinterpretation by courts.

*Response*

**TCEQ disagrees with the commenters' assertion that its practices are the equivalent of a blanket exemption from compliance with emission limits. The commission reaffirms its position that emissions events are violations. As part of the most recent amendment to §101.222, effective January 5, 2006, the commission agreed with EPA's comment that assertion of an affirmative defense to an enforcement action does not relieve the source from liability for a violation of the SIP, but instead allows the source to avoid civil penalties when certain criteria are met in a judicial or administrative enforcement action. (30 TexReg 8884, 8922 - 8923 (December 30, 2005))**

**TCEQ consistently pursues administrative, as well as civil, enforcement against non-compliant regulated industries in accordance with a vigorous, clearly articulated regulatory framework. Texas does not indiscriminately allow industries to release excess amounts of air pollution when equipment breaks down and when facilities undergo maintenance work. Rather, TCEQ has a multifaceted approach to minimize emissions from maintenance activities and upsets (malfunctions). When a**

**source reports excess emissions, each report is reviewed by an investigator. Although most investigations occur in-house, the investigations include a thorough review of the incident. Investigators may ask questions pertaining to, for example, the number of previous events in order to assess whether there is a pattern of excess emissions. Investigators may ask for further information regarding how the event could have been avoided by good design, maintenance, and operation. At the conclusion of the investigation, if the regulated entity meets all criteria, and provides sufficient documentation in response to agency requests, then the investigator may not penalize the regulated entity for the violation. The determination does not limit enforcement actions taken by other parities for that violation. Further, in Fiscal Year 2015, the TCEQ assessed $2,875,661 in administrative penalties related to emissions events.**

*Comment*

Sierra Club commented that power plants and other facilities can emit massive amounts of dangerous pollution during periods of SSM. Specifically, Sierra Club mentioned that the TCEQ issued ten permits in 2011 which authorize particulate matter emissions from coal-fired power plants during SSM periods up to 7,616 pounds per hour, which is far higher than allowable emission rates during normal operations, and these permits do not restrict the number of SSM events or hours during which the higher limits apply. Further, the commenter noted that based on its' review of 2012 emission inventory data, if a plant were to release the amount of particulate pollution allowed during SSM periods, those emissions would be so high that the emissions

would account for between 15% and 66% of what is normally emitted during an entire year of operations, and these emissions have serious, day-to-day impacts on ordinary Texans. The commenter noted that the TCEQ's proposal turns a blind eye to these impacts and will only preserve the status quo.

*Response*

**In 2005, the TCEQ amended §101.222 by including an enforcement-based strategy for permitting planned MSS emissions. The rule includes a seven-year schedule, for owners and operators to obtain authorization of MSS activities for their facilities. In response, the regulated community sought and obtained authorization, either through a Permit by Rule, Standard Permit, or a case-by-case permit. During the schedule provided for in the rule, which has now expired, the regulated community overwhelmingly responded by seeking authorization of MSS activities. The authorizations include specific emission limitations and durations for planned MSS activities or require certain work practices be followed. Furthermore, TCEQ reviews maintenance activity emissions for Best Available Control Technology, ensures an off-property impacts analysis is performed, and the results are protective emissions limits on the Maximum Allowable Emission Rates Table. Texas is one of very few states that has extensively authorized planned MSS emissions to be permitted in a collaborative effort to control emissions during these operating scenarios.**

**With regard to power plants, owners and operators of all of the electric generating facilities in Texas applied for and were issued permit amendments that authorized**

**MSS activities. When these authorizations for MSS activities were sought, increases in annual emission rates for the boilers were not requested, because the owners and operators were able to include the emissions from these additional activities as part of their current allowable emission rates. TCEQ disagrees that these authorized emissions are inappropriate and that the proposed amendments to the affirmative defense rule ignores impacts from unauthorized emissions because they were subject to the permit review process described earlier.**

**Any planned maintenance activities that TCEQ determines are not in compliance with the applicable permit are not authorized and may result in additional requirements through enforcement actions. Emissions from upsets (also commonly referred to as malfunctions) are not authorized and are subject to enforcement.**

**As discussed elsewhere, TCEQ consistently pursues administrative, as well as civil, enforcement against non-compliant regulated industries in accordance with a vigorous, clearly articulated regulatory framework. Texas does not allow industries to release excess amounts of air pollution when equipment breaks down and when facilities undergo maintenance work. Rather, TCEQ has a multifaceted approach to minimize emissions from maintenance activities and upsets (malfunctions).**

*Comment*

Environment Texas and LSCSC, EIP, and Sierra Club commented that the EPA's SSM SIP Call to eliminate Texas' affirmative defense will deter massive and avoidable emissions

by driving industries to fix problems rather than hiding behind affirmative defenses. The commenters also included a discussion regarding a number of specific examples of upsets reported by specific companies.

*Response*

**TCEQ disagrees that the EPA's SSM SIP Call to eliminate the TCEQ's rule regarding affirmative defenses will deter massive and avoidable emissions. This is because the affirmative defense rule is applicable only to emissions that were unavoidable, among other criteria. Emissions that are avoidable are subject to administrative enforcement without an opportunity to claim an affirmative defense. The availability of an affirmative defense in civil actions will be at the discretion of the court. In addition, the criteria used to determine eligibility for the affirmative defense require that regulated entities properly operate and maintain pollution control equipment, take prompt action, and minimize emissions. The criteria also require that emissions are not part of a recurring pattern and that the percentage of a facility's total annual operating hours during which unauthorized emissions occurred are not unreasonably high. This program of evaluation and oversight as implemented by TCEQ drives industries to fix problems in order to be eligible for the affirmative defense, not the converse. As stated elsewhere in this preamble, TCEQ has a multifaceted approach to minimize emissions from maintenance activities and upsets (malfunctions). When a source reports excess emissions, each report is reviewed by an investigator. TCEQ consistently pursues administrative, as well as civil, enforcement against non-compliant regulated industries in accordance**

**with a vigorous, clearly articulated regulatory framework.**

*Comment*

Environment Texas and LSCSC, EIP, and Sierra Club commented that the actual volatile organic compound (VOC) and nitrogen oxide ($NO_x$) emissions for flares during SSM events are likely significantly higher than what is reported based on EPA's recent finding that current VOC and $NO_x$ "AP-42" emission factors grossly underestimate releases by a factor of 4 and 42 respectively.

***Response***

**The commission disagrees with the commenters' assertion that $NO_x$ and VOC emissions from flares during SSM events are likely much greater than reported based on the EPA's recent finding concerning AP-42 emission factors for flares. The EPA did not finalize the proposed AP-42 $NO_x$ emission factor for flares that were 42 times higher than the current factor due to data quality issues associated with the $NO_x$ data. Information regarding the EPA's finalized AP-42 emission factors for industrial flares and details regarding the data quality issues with the EPA's $NO_x$ data are available at *https://www3.epa.gov/ttn/chief/consentdecree/index_consent_decree.html.***

**While the EPA's new VOC emission factor for industrial flares in AP-42, Section 13.5, is approximately four times higher than the previous total hydrocarbon emission**

**factor, the commission notes that the TCEQ's emissions inventory guidance (TCEQ Publication RG-360/15, January 2016, page A-47) specifies that emission factors cannot be used to determine uncombusted flared gas emissions and specifically states that the total hydrocarbon and VOC emission factors from AP-42, Section 13.5 should not be used. According to the emissions inventory guidance, flare VOC emissions should be calculated using the flared gas flow rate, composition, and permitted destruction and removal efficiency (DRE). Additionally, the commission expects that during SSM events a flare would be likely receiving gas streams that are high heat content, i.e., the British thermal units per cubic foot of the gas stream is much higher than during normal operations. If the flare is operated properly, the DRE would be expected to be higher than normal while receiving a gas stream that is high in heat content.**

*Response to the EPA's SSM SIP Call*

*Comment*

EPA commented that the SIP submittal letter should state that the submission of the proposed SIP revisions by Texas is being made in response to the EPA's SSM SIP Call 80 FR 33839, at 33968, 33969 (June 12, 2015).

***Response***

**The commission's SIP submittal letter states that the submission of the proposed SIP revisions by Texas is being made in response to the EPA's SSM SIP Call.**

*Comment*

Luminant commented that each of its lignite and subbituminous coal-fired facilities, to varying degrees of significance and along with most other sources of air emissions in Texas, are affected by EPA's June 12, 2015, EPA's SSM SIP Call, which seeks to eliminate the affirmative defenses in §101.222(b) - (e). Thus, the TCEQ's response to the EPA's SSM SIP Call directly affects Luminant and, in no small measure, the future viability of some of its facilities, specifically those that use electrostatic precipitators to control particulate matter emissions and opacity.

***Response***

**The commission agrees that, given the broad definition of "emissions event," which applies to all facilities owned or operated by regulated entities in Texas, the impact of any rule change is also broad.**

*Comment*

Luminant commented that EPA's reinterpretation of FCAA requirements that underpin the EPA's SSM SIP Call is just the latest flip in a decades-long series of EPA interpretations that it seeks to impose on Texas. The commenter noted that from a regulated entity perspective, it seems that just as Texas comes into compliance with an EPA pronouncement as to the proper handling of emissions events, EPA pivots and instructs the State to redo its SIP, and Texas, in good faith, tries to comply.

***Response***

**Luminant is correct that this rulemaking is the TCEQ's latest response to EPA's policy changes over more than 40 years regarding emissions from MSS activities and upsets (or malfunctions), following EPA's 1972 approval of the original Texas SIP. (37 FR 10842, 10895 (May 31, 1972))**

**Until planned MSS emissions began to be authorized by permit on a wide-scale basis in 2007, SIP-approved regulation of all MSS activities and upsets generally involved 1) notification of an MSS activity or upset to TCEQ (or its predecessor agency); and 2) a determination by TCEQ whether the emissions occurring during the MSS activities or upsets were exempted from complying with any applicable emissions limits.**

**In 2000, the commission amended its rules, in response to EPA's review of rule amendments made in 1991 and 1997 by TCEQ's predecessor agencies, by adding criteria that an owner or operator was required to satisfy before the TCEQ's executive director would determine that the exemption applied to emissions from MSS activities not authorized by a permit (25 TexReg 6750 - 6751 (Jul. 14, 2000)) EPA approved the exemption language that included the more stringent criteria as part of the Texas SIP. (65 FR 70729 (Nov. 28, 2000)) Because the criteria must be satisfied before the exemption would apply to emissions from MSS activities, the exemption was not automatic, and, instead, it was effectively an affirmative defense. (25 TexReg 6750 - 6751 (Jul. 14, 2000))**

In response to legislation amending the TCAA, the commission's rules were amended to distinguish between "planned" MSS activities and "unplanned" MSS activities, as well as adopting associated specific definitions, including one for "Emissions event." That distinction was important for both authorizing MSS activities and reporting, and possible enforcement of, emissions from these activities. TCEQ rules do not define "planned MSS activity," but define "Unplanned maintenance, startup, or shutdown activity" in §101.1(109); "planned" generally means "authorized" emissions. It should be noted that "planned" is not the equivalent of "scheduled." The use of the term "Scheduled maintenance, startup, or shutdown activities" is related to the TCEQ reporting requirements for unauthorized emissions, as required by the TCAA, THSC, §382.0215; and §101.1(91) and §101.221 of the commission's rules.

In 2003, in response to a subsequent EPA request, TCEQ amended language in its rules to replace "exempt from compliance" with applicable limits to "subject to an 'affirmative defense'" to enforcement penalties for planned MSS activities. (28 TexReg 118 (Jan. 2, 2004)) This affirmative defense for emissions from planned MSS activities was temporary.

In 2005, TCEQ adopted a schedule for phasing out the use of that affirmative defense as an incentive for owners and operators to obtain permit authorization for their planned MSS activities, codified in §101.222(h)(1). (30 TexReg 8956 (Dec. 30,

**2005)) EPA approved the commissions' affirmative defense rule, §101.222(b) - (e) in 2010. (75 FR 68989 (Nov. 10, 2010)) The benefit of authorizing planned MSS activities is broad. Specifying controls or work practices for emissions, as well as including monitoring, recordkeeping, and reporting requirements in a permit results in greater environmental benefit and is a more streamlined approach to compliance for regulated entities.**

**With its SSM SIP Call, EPA is changing its interpretation of the FCAA and its policies, requiring yet another change in regulatory oversight of emissions from emissions events and unplanned MSS activities.**

*Comment*

EPA acknowledged that this rulemaking is TCEQ's response to the EPA's SSM SIP Call. Sierra Club commented that the proposed rule fails to satisfy the requirements of the FCAA or EPA's final policy expressed in the EPA's SSM SIP Call and should not be approved.

TIP supports the TCEQ's proposed changes to §101.222, which constitute a response to EPA's SSM SIP Call that is consistent with the legal basis for pending judicial challenges to the EPA's SSM SIP Call. AECT strongly supports TCEQ's plan to respond to the SIP Call by revising §101.222 to explicitly address EPA's purported, and recently developed, basis for the SIP Call, which is not legally supportable.

***Response***

**As stated elsewhere in this preamble, in its final rulemaking for the SSM SIP Call, the EPA "concluded that the enforcement structure of the (F)CAA, embodied in section 113 and section 304, precludes any affirmative defense provisions that would operate to limit a court's jurisdiction or discretion to determine the appropriate remedy in an enforcement action." (80 FR 88339, 88351) Because adopted §101.222(k) clarifies that the section does not operate to limit a court's jurisdiction, it directly responds to and satisfies EPA's SSM SIP Call with regard to Texas.**

*Comment*

Environment Texas and LSCSC, EIP, and Sierra Club commented that while Texas is well within its right to challenge the EPA's SSM SIP Call in federal court, Texas cannot unilaterally choose to ignore the EPA's SSM SIP Call, as it is doing with this proposed rule. Rather than following the law, which requires compliance with a duly adopted federal rule, Texas is refusing to make any changes to its rules unless and until a court makes Texas do it. The commenters noted that the proper avenue would be for Texas to seek a stay in federal court. The commenter also noted that absent a stay, Texas must comply with the EPA's SSM SIP Call.

***Response***

**The commission initiated this rulemaking in response to EPA's SSM SIP Call and**

**§101.222(k) addresses EPA's concern. As stated elsewhere in this preamble, in its final rulemaking for the EPA's SSM SIP Call, the EPA "concluded that the enforcement structure of the (F)CAA, embodied in section 113 and section 304, precludes any affirmative defense provisions that would operate to limit a court's jurisdiction or discretion to determine the appropriate remedy in an enforcement action." (80 FR 88339, 88351) Therefore, subsection (k) directly responds to EPA's SSM SIP Call.**

**As the commenters state, Texas is well within its rights to challenge the EPA's SSM SIP Call. However, revising its SIP to remove the affirmative defense rule during the pending litigation could be perceived that TCEQ is waiving its position in the litigation. While EPA calls for removal of the affirmative defense rule, its notice in the *Federal Register*, as quoted earlier, supports the rule amendment the commission is adopting in §101.222(k). Although Texas is challenging the EPA's SSM SIP Call, the commission is not ignoring the requirement that Texas submit a revision to its affirmative defense rule. This adopted rule satisfies the requirement that TCEQ submit a SIP revision by November 22, 2016. The adopted amendments will address EPA's concern whether Texas and other petitioners prevail, or if EPA prevails.**

*Comment*

Environment Texas and LSCSC, EIP, and Sierra Club commented that it seems almost

absurd that TCEQ should choose to fight EPA on this SIP Call when making a small rule change would allow it to continue its current administrative enforcement policies without violating federal law.

EPA commented that it strongly recommends that the TCEQ submit a SIP revision that will simply remove §101.222(b) - (e) from the Texas SIP. The EPA added that such a SIP revision would meet the requirements of the EPA's SSM SIP Call and bring the Texas SIP into compliance with FCAA requirements on this issue.

***Response***

**The commission has made no change to the rule in response to these comments. Environment Texas and LSCSC, EIP, and Sierra Club characterize the response required by EPA in the EPA's SSM SIP Call as "making a small rule change." Presumably, based on their comments, and the fact that EPA "strongly recommends" removal of the affirmative defense, these commenters are referring to removing the affirmative defense or revising it to be a state-only enforcement option. The affirmative defense provisions in §101.222(b) - (e) are an important component in the SIP to maintain air quality. When sources exceed permitted limits due to unplanned MSS activities or malfunctions, TCEQ reviews these events against these criteria to determine if the event was avoidable and assesses whether or not operators took measures to minimize emissions. TCEQ has extensive reporting requirements for these types of events, and every incident reported to the agency is reviewed. Once a report is received, investigators first determine**

**whether the event was excessive. This determination hinges on six criteria relating to the frequency, cause, quantity and impact of emissions, duration, percentage of annual operating hours during which the emissions event occurred, and the need for MSS activities. In order to assess the quantity and impact on human health or the environment for excessive emissions events, air modeling of the emissions is conducted. The results are compared to state and federal standards such as the NAAQS and may also be evaluated by TCEQ toxicologists. The commission seeks to maintain the affirmative defense provisions as an integral part of the SIP and the air quality program.**

**Although the commission is not removing the affirmative defenses in §101.222(b) - (e), this rulemaking is in response to the EPA's SSM SIP Call by adoption of rule text that incorporates EPA's own language that expresses the EPA's basis for the SIP Call. EPA's notice in the *Federal Register* supports the rule amendment the commission is adopting in §101.222(k). The EPA "concluded that the enforcement structure of the (F)CAA, embodied in section 113 and section 304, precludes any affirmative defense provisions that would operate to limit a court's jurisdiction or discretion to determine the appropriate remedy in an enforcement action." (80 FR 88339, 88351) As some commenters for this §101.222(k) rulemaking acknowledge, Texas is well within its rights to challenge the EPA's SSM SIP Call. Revising the Texas SIP to remove the affirmative defense rule during the pending litigation could be perceived that TCEQ is waiving its position in the litigation.**

*Comment*

Environment Texas and LSCSC, EIP, and Sierra Club commented that TCEQ could remove the affirmative defense provisions, as EPA has recommended. The commenters noted that this change would give the state maximum enforcement discretion while allowing the FCAA, and not state rules, to guide enforcement in federal actions by EPA and citizens. Alternatively, the commenters noted that TCEQ could retain the affirmative defense provisions and explicitly make them state-only rules. The commenters noted that this change would mean that federal courts would not be bound by the TCEQ's affirmative defense rules or decisions, but that state regulators would continue to be guided by the affirmative defense criteria when deciding whether to pursue enforcement.

EPA commented that the existing affirmative defenses in §101.222(b) - (e) are narrowly drawn and the EPA does not believe that the affirmative defenses would interfere with the state's required enforcement authority to meet other applicable FCAA requirements if TCEQ chooses to retain the affirmative defenses for state law purposes.

***Response***

**It is the commission's position that the current affirmative defense rule does not limit EPA or citizens from taking enforcement action, nor the federal district courts in which the enforcement case is brought. The commission recognizes that even with good operation and maintenance, mechanical failures occur. When these**

**unavoidable events happen, the affirmative defense provisions serve in concert with other program requirements to create an incentive for prompt corrective action to minimize emissions. As discussed elsewhere, the affirmative defense is an important component of the SIP, and therefore, the commission chooses to maintain the integrity of the state's plan to control the quality of the state's air. However, this rulemaking is performed in response to EPA's SSM SIP Call to clarify the intent of the applicability and use of an affirmative defense in federal court. The commission appreciates EPA's acknowledgement that the previously approved affirmative defense provisions are narrowly tailored, and do not interfere with the state's enforcement authority. The TCEQ enforces against emissions events on a regular basis.**

**With regard to any SIP inadequacy regarding lack of continuous compliance requirements, EPA has failed to actually identify a legally sufficient basis for the alleged inadequacies (beyond inclusion of an affirmative defense) so that TCEQ can appropriately respond.**

*Comment*

EPA commented that the EPA does not agree that states may include affirmative defenses in SIP provisions, because such provisions are by design created to alter or eliminate the statutory jurisdiction of the federal courts to determine liability and to impose the full range of remedies provided in the FCAA. The commenter also noted

that to the extent that a state elects to have such affirmative defense provisions for purposes of state law only, such provisions may be appropriate but should not be included in the SIP.

***Response***

**In its final rulemaking for the SSM SIP Call, the EPA "concluded that the enforcement structure of the (F)CAA, embodied in section 113 and section 304, precludes any affirmative defense provisions that would operate to limit a court's jurisdiction or discretion to determine the appropriate remedy in an enforcement action." (80 FR 88339, 88351) This statement is from the portion of the EPA's SSM SIP Call notice regarding EPA's change in policy. The commission understands this statement means that EPA is not opposed to affirmative defenses in SIPs, but rather affirmative defenses that operate to limit a court's jurisdiction. Because adopted §101.222(k) clarifies that §101.222(b) - (e) does not operate to limit a court's jurisdiction, it directly responds to and satisfies EPA's SSM SIP Call with regard to Texas.**

*Possible EPA Action*

*Comment*

Luminant commented that EPA fails to recognize and acknowledge that Texas has always had a complementary set of rules to address SSM in its SIP and many, if not all, of the present Texas SIP emissions limits were developed and exist in parallel with

provisions that applied during these specific phases of operation. Therefore, Luminant expressed concern that the EPA intends to act in Texas before judicial review is complete and that EPA is attempting to justify that action based on its mistaken belief or intentional mischaracterization that its SSM SIP Call is requiring Texas to remove a provision that it has only had for a few years, as EPA expresses in its initial brief to the D.C. Circuit in the EPA's SSM SIP Call litigation.

Luminant further commented that EPA should exercise restraint, accept the proposed rules and not proceed with a Federal Implementation Plan (FIP) until its latest reinterpretation of the FCAA is vetted by the courts. The commenter noted that this is particularly true for Texas, which is in the enviable position of having a decision of the Fifth Circuit that upholds the Texas affirmative defense provisions. (*Luminant Generation Co. LLC v. EPA*, 714 F.3d 841 (5th Cir. 2013))

AECT commented that without this rulemaking by TCEQ, EPA could immediately act to issue a FIP to remove §101.222(b) - (e) from the SIP prior to a ruling by the Circuit Court for the District of Columbia on the litigation challenging the EPA's SSM SIP Call.

***Response***

**The commission agrees that the affirmative defense provisions are longstanding, and have been effective since 2005. As previously discussed, the affirmative defense rule is the latest applicable regulatory response to emissions from MSS activities and upsets.**

**The commission acknowledges that EPA may elect to issue a FIP prior to the conclusion of the litigation challenging the EPA's SSM SIP Call, but supports EPA exercising restraint in doing so until the EPA's SSM SIP Call litigation is complete and acting to issue a FIP only if the judicial opinions support such an action by EPA. Although Texas is challenging the EPA's SSM SIP Call, the commission is not ignoring the requirement that Texas submit a revision to its affirmative defense rule. This adopted rule satisfies the requirement that TCEQ submit a SIP revision by November 22, 2016. The adopted amendment addresses EPA's concern whether Texas and other petitioners prevail, or if EPA prevails. However, if EPA issues a FIP prior to the conclusion of all of the litigation regarding the EPA's SSM SIP Call with regard to Texas, the commission will review EPA's action and determine what its response will be, which may include challenging any final action brought by EPA to remove §101.222(b) - (e) from the Texas SIP.**

*§101.222(k) and (l)*

*Comment*

Luminant commented that proposed §101.222(k) clearly indicates TCEQ’s intent to accommodate EPA's concerns if the outcome of the litigation challenging the EPA's SSM SIP Call is resolved in favor of EPA. TIP supports the combination of proposed §101.222(k) and (l), which would provide that if the existing affirmative defense becomes prohibited based on the pending judicial challenges to the EPA's SSM SIP Call, then the affirmative defense will not limit a federal court's jurisdiction or discretion to

determine the appropriate remedy in an enforcement action.

Luminant further commented that it is a petitioner alongside the State of Texas and other states challenging EPA's SSM SIP Call in the D. C. Circuit. (*Walter Coke, Inc. v EPA*, Case No. 15-1166 (D.C. Circuit)) Luminant appreciates that implementation of the proposed revision in this rulemaking to address EPA's SSM SIP Call concerns is made directly dependent on the completion and outcome of that litigation.

***Response***

**The commission agrees that this rulemaking is to respond to EPA and also allow for the resolution of the pending litigation.**

*§101.222(k)*

*Comment*

AECT commented that the current affirmative defenses in §101.222(b) - (e) does not limit a court's jurisdiction or discretion to determine the appropriate remedy in an enforcement act, and no federal court has interpreted the rule in that way. Therefore, the commenter notes that proposed §101.222(k) addresses EPA's concern that formed the basis for the EPA's SSM SIP Call.

***Response***

**The commission agrees that §101.222(k) addresses EPA's concern. In its final rulemaking for the SSM SIP Call, the EPA "concluded that the enforcement structure**

**of the (F)CAA, embodied in section 113 and section 304, precludes any affirmative defense provisions that would operate to limit a court's jurisdiction or discretion to determine the appropriate remedy in an enforcement action." (80 FR 88339, 88351) Because adopted §101.222(k) clarifies that the section does not operate to limit a court's jurisdiction, it directly responds to and satisfies EPA's SSM SIP Call with regard to Texas.**

**In addition, in response to a comment regarding the effect of the commission's affirmative defense rules on EPA or citizen enforcement, the TCEQ responded, and has since maintained the position, that there is no intent to affect those cases, which are required to be brought in federal district court.**

*Comment*

EPA commented that merely adding a statement to the SIP that the existing affirmative defense provisions "are not intended" to affect the federal courts is insufficient because the provisions will be perceived as imposing binding requirements that courts must adhere to, rather than exercising the full range of authority conferred upon the federal courts in the FCAA. The commenter noted that to retain such provisions would, at a minimum, lead to confusion on the part of regulated entities, regulators, the public, and the courts. The commenter noted that in the EPA's SSM SIP Call, the EPA has directed states to remove existing affirmative defense provisions from SIPs, including those in §101.222(b) - (e). Thus, the commenter noted that the proposed revisions to add §101.222(k) will not meet the requirements of the EPA's SSM SIP Call.

*Response*

**As previously discussed, in the EPA's final rulemaking for the SSM SIP Call, the EPA "concluded that the enforcement structure of the (F)CAA, embodied in section 113 and section 304, precludes any affirmative defense provisions that would operate to limit a court's jurisdiction or discretion to determine the appropriate remedy in an enforcement action." (80 FR 88339, 88351). Because adopted §101.222(k) clarifies that the section does not operate to limit a court's jurisdiction, it directly responds to and satisfies EPA's SSM SIP Call with regard to Texas.**

**The commission disagrees that this text would lead to confusion because it would be perceived or applied as a binding requirement on a court. Rather, this rulemaking clarifies that the TCEQ's affirmative defense does not bind a court, and therefore, eliminates EPA's concern about its unsupported perception.**

**EPA's basis for the SIP call is stated as concern regarding affirmative defenses that could be interpreted to impair a federal court's jurisdiction. Since that basis is not expressly stated in TCEQ's rules, adopted §101.222(k) addresses the basis for the EPA's SSM SIP Call, rendering the alleged confusion moot.**

*§101.222(l)*

*Comment*

AECT commented that the delay in the effective date of §101.222(k) that would be provided by §101.222(l) is anticipated by EPA. The commenter noted that this is because the EPA's SSM SIP Call states that "EPA notes that the state regulatory revisions that the state has adopted and submitted for SIP approval will most likely be already in effect at the state level during the pendency of the EPA's evaluation of and action upon the new SIP revision." (80 FR 33849) The commenter noted that EPA's use of the term "most likely" shows that it anticipates that the rule revisions that are in some proposed SIP revisions that states will submit in response to their SIP Calls will not be effective while EPA is reviewing and deciding whether to approve the states' proposed SIP revisions.

Luminant commented that to the extent that EPA may voice concerns about a SIP revision that is made contingent on an external event, such as the outcome of the D.C. Circuit litigation, that concern would not be a lawful basis for EPA to disapprove §101.222(l). Luminant supports establishing a compliance date that is contingent on a final decision of the D.C. Circuit holding that Texas' affirmative defense is contrary to the FCAA.

***Response***

**Adopted §101.222(l) does not establish a requirement contingent on an external event, but rather establishes when the adopted amendments become applicable. The rule amendment in §101.222(k) fully responds to the EPA's SSM SIP Call and is anticipated to become effective on or about November 24, 2016. Although the final,**

**binding outcome of the litigation is likely to be an opinion issued by the D.C. Circuit, that court is not named in the rule because that court's opinion could possibly be appealed to the United States Supreme Court.**

*Comment*

EPA commented that the practical effect of §101.222(l) is that substantially inadequate SIP provisions (§101.222(b) - (e)) would remain in the SIP for an indefinite period of time, perhaps a period of several additional years. The commenter noted that even if §101.222(k) were otherwise valid, the EPA does not agree that states may include provisions that have the effect of deferring a required SIP revision as provided in §101.222(l). The commenter noted that such an approach is inconsistent with the explicit statutory requirement that states make corrective SIP submissions no later than 18 months after the EPA's issuance of a SIP call. Thus, the commenter noted that the revision to add §101.222(l) will not meet the requirements of the EPA's SSM SIP Call.

***Response***

**EPA's SSM SIP Call has been challenged and is pending in the D.C. Circuit by the State of Texas, TCEQ, several Texas industry groups, 18 other states, approximately 23 industry groups and trade associations, and several electric generating companies. Five environmental groups have intervened on behalf of EPA. Section 101.222(l) provides that §101.222(k) would not be applicable until all appeals regarding the EPA's SSM SIP Call, as it applies to §101.222(b) – (e), have ended and**

**the EPA's SSM SIP Call is upheld.**

**EPA's finding of substantial inadequacy of §101.222(b) - (e) is being challenged and until all challenges, including any challenge of a FIP by EPA, are complete, there is no final determination that the Texas SIP would include any substantially inadequate provisions. The results of this challenge will determine if §101.222(b) - (e) are truly inadequate; therefore what revisions, if any, are needed for the Texas SIP. In addition, EPA's concern that "substantially inadequate SIP provisions (§101.222(b) - (e)) would remain in the SIP for an indefinite period of time, perhaps a period of several additional years" is not supported by any evidence that retaining the affirmative defense in the Texas SIP renders the Texas SIP inadequate to protect air quality.**

**The commission agrees that the FCAA requires states revise their SIPs in response to a SIP Call. TCEQ is meeting the deadline for the EPA's SSM SIP Call required revision with the adoption of §101.222(k) and (l). EPA's conclusion that disagrees with the commission's response and basis for the response ignores EPA's own SSM SIP Call notice, as previously discussed.**

**EPA's comment that the §101.222(l) has the effect of deferring a required SIP revision is without merit. However, because the rule amendment responds to the EPA's SSM SIP Call, will be effective as law in the State of Texas, and will be timely**

**submitted to EPA, the requirements for a SIP revision will be met. Therefore, unless EPA is prepared to propose approval and adopt the commission's response to the EPA's SSM SIP Call, the commission urges EPA to exercise restraint in responding to this SIP revision. EPA has 18 months to act on the SIP submittal. The ongoing litigation, and any potential litigation regarding a FIP, if issued, could be completed within the next 18 months. However, if EPA issues a FIP prior to the conclusion of all of the litigation regarding the EPA's SSM SIP Call with regard to Texas, the commission will review EPA's action and determine what its response will be, which may include challenging any final action brought by EPA to remove §101.222(b) - (e) from the Texas SIP.**

*Comment*

AECT suggested that part of §101.222(l) be revised to state "(p)rovisions Applying..., as it applies to subsections (b) - (e) of this section, (SIP Call) have ended and there is a final and non-appealable court decision that upholds the SIP Call." AECT commented that these changes are necessary because if the affirmative defenses in §101.222(b) - (e) were to be "prohibited," there would be no need for proposed new §101.222(k). The commenter noted that the only scenario in which the affirmative defenses in §101.222(b) - (e) would have any meaning or purpose would be if the court upholds the EPA's SSM SIP Call, which would leave §101.222(b) - (e) in place for TCEQ to address in a proposed SIP revision in response to the EPA's SSM SIP Call.

***Response***

**If the EPA's SSM SIP Call is upheld, the commission can consider a further response to the EPA's SSM SIP Call, and may consider maintaining the affirmative defense provisions in §101.222(b) - (e) outside of the SIP. If the result of the pending litigation results in affirmative defenses not being allowed for SIP violations, then the affirmative provisions would be prohibited in that context. The commission is adopting changes to §101.222(l) in response to this comment.**

*Work Practices for Certain Activities*

*Comment*

AECT requested that TCEQ be open to considering the future development of rules that would establish work practice standards based on the existing work practice standards that EPA adopted in its rules that apply to MSS activities, such as the work practice standards identified in Table 3 of the Mercury and Air Toxics Standards (MATS) in 40 CFR Part 63, Subpart UUUUU.

***Response***

**The commission acknowledges AECT's request for rules that would establish work practice standards be considered. Because this comment pertains to consideration of a future rulemaking, the commission has made no change to §101.222 in response to this comment.**

**The federal rule, 40 CFR Part 63, Subpart UUUUU, is an applicable requirement for the Title V Federal Operating Permit Program. As with all rules that are applicable**

**requirements, the holder of a Title V permit should evaluate its compliance or permitting obligations.**

*Comment*

Luminant recommended that TCEQ consider the incorporating work practices recently adopted by EPA in its MATS rule as Maximum Achievable Control Technology (MACT) into the TCEQ-issued air permits for these units as emission limits for the startup and shutdown phases of operation, regardless as to whether the startup or shutdown is planned, unplanned, or as a result of a malfunction. The commenter noted that the MATS work practices function to limit emissions during the startup and shutdown phases of operation in a manner that is similar to the elements of an affirmative defense. The commenter noted that perhaps most important, EPA has determined the steps of the work practices to constitute MACT and it is difficult to imagine how EPA could object to MACT during the startup and shutdown phases of operation for these units. The commenter noted that as recently as July 2016, EPA has defended its final MATS startup and shutdown work practice standards as a FCAA requirement for continuous emission standards. See Denial of Petitions for Reconsideration of Certain Startup/Shutdown Issues: MATS, page 29, as referenced in 81 FR 52347 (August 8, 2016).

***Response***

**The commission already authorizes startups and shutdowns due to planned maintenance in New Source Review permits. The commission acknowledges**

**Luminant's request for New Source Review permit conditions that would establish work practice standards for startup and shutdowns that are due to unplanned circumstances or malfunctions. Because permitting practices and rules regarding permitting are located in 30 TAC Chapters 106, 116, and 122, the commission has made no change to §101.222 regarding incorporating work practices as part of permits.**

**The federal rule, 40 CFR Part 63, Subpart UUUUU, commonly referred to as the "MATS Rule" is an applicable requirement for the Title V Federal Operating Permit Program, and therefore Title V permittees should evaluate their compliance or permitting obligations.**

**SUBCHAPTER F: EMISSIONS EVENTS AND SCHEDULED MAINTENANCE, STARTUP, AND SHUTDOWN ACTIVITIES**
**DIVISION 3: OPERATIONAL REQUIREMENTS, DEMONSTRATIONS, AND ACTIONS TO REDUCE EXCESSIVE EMISSIONS**

**§101.222**

**Statutory Authority**

The amended rule is adopted under Texas Water Code (TWC), §5.013, concerning General Jurisdiction of Commission, which establishes the general jurisdiction of the commission; TWC, §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; and TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission. The rule amended is also adopted under Texas Health and Safety Code (THSC), §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; THSC, §382.0215, concerning Assessment of Emissions Due to

Emissions Events, which defines "emissions event," requires owners and operators of regulated entities to meet certain requirements, and requires the commission to centrally track and collect information relating to emissions events, including the use of electronic reporting; and THSC, §382.0216, concerning Regulation of Emissions Events, which establishes and prescribes criteria for and requires responses to excessive emissions events, allows for use of corrective action plans in response to excessive emissions events, and authorizes the commission to establish an affirmative defense to a commission enforcement action for emissions events.

In addition, the amended rule is also adopted under Federal Clean Air Act, 42 United States Code, §§7401, *et seq.*, which requires states to submit State Implementation Plan revisions that specify the manner in which the National Ambient Air Quality Standards will be achieved and maintained within each air quality control region of the state.

The adopted amendment will implement THSC, §§382.002, 382.011, 382.012, and 382.017.

**§101.222. Demonstrations.**

(a) Excessive emissions event determinations. The executive director shall determine when emissions events are excessive. To determine whether an emissions event or emissions events are excessive, the executive director will evaluate emissions events using the following criteria:

(1) the frequency of the facility's emissions events;

(2) the cause of the emissions event;

(3) the quantity and impact on human health or the environment of the emissions event;

(4) the duration of the emissions event;

(5) the percentage of a facility's total annual operating hours during which emissions events occur; and

(6) the need for startup, shutdown, and maintenance activities.

(b) Non-excessive upset events. Upset events that are determined not to be excessive emissions events are subject to an affirmative defense to all claims in enforcement actions brought for these events, other than claims for administrative technical orders and actions for injunctive relief, for which the owner or operator proves all of the following:

(1) the owner or operator complies with the requirements of §101.201 of this title (relating to Emissions Event Reporting and Recordkeeping Requirements). In

the event the owner or operator fails to report as required by §101.201(a)(2) or (3), (b), or (e) of this title, the commission will initiate enforcement for such failure to report and for the underlying emissions event itself. This subsection does not apply when there are minor omissions or inaccuracies that do not impair the commission's ability to review the event according to this rule, unless the owner or operator knowingly or intentionally falsified the information in the report;

(2) the unauthorized emissions were caused by a sudden, unavoidable breakdown of equipment or process, beyond the control of the owner or operator;

(3) the unauthorized emissions did not stem from any activity or event that could have been foreseen and avoided or planned for, and could not have been avoided by better operation and maintenance practices or technically feasible design consistent with good engineering practice;

(4) the air pollution control equipment or processes were maintained and operated in a manner consistent with good practice for minimizing emissions and reducing the number of emissions events;

(5) prompt action was taken to achieve compliance once the operator knew or should have known that applicable emission limitations were being exceeded, and any necessary repairs were made as expeditiously as practicable;

(6) the amount and duration of the unauthorized emissions and any bypass of pollution control equipment were minimized and all possible steps were taken to minimize the impact of the unauthorized emissions on ambient air quality;

(7) all emission monitoring systems were kept in operation if possible;

(8) the owner or operator actions in response to the unauthorized emissions were documented by contemporaneous operation logs or other relevant evidence;

(9) the unauthorized emissions were not part of a frequent or recurring pattern indicative of inadequate design, operation, or maintenance;

(10) the percentage of a facility's total annual operating hours during which unauthorized emissions occurred was not unreasonably high; and

(11) the unauthorized emissions did not cause or contribute to an exceedance of the national ambient air quality standards (NAAQS), prevention of significant deterioration (PSD) increments, or to a condition of air pollution.

(c) Unplanned maintenance, startup, or shutdown activity. Emissions from an unplanned maintenance, startup, or shutdown activity that are determined not to be excessive are subject to an affirmative defense to all claims in enforcement actions

brought for these activities, other than claims for administrative technical orders and actions for injunctive relief, for which the owner or operator proves the emissions were from an unplanned maintenance, startup, or shutdown activity, as defined in §101.1 of this title (relating to Definitions), and all of the following:

(1) for a scheduled maintenance, startup, or shutdown activity, the owner or operator complies with the requirements of §101.211 of this title (relating to Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements). For an unscheduled maintenance, startup, and shutdown activity, the owner or operator complies with the requirements of §101.201 of this title and demonstrates that reporting under §101.211(a) of this title was not reasonably possible. Failure to report information that does not impair the commission's ability to review the activity, such as minor omissions or inaccuracies, will not result in enforcement action and loss of opportunity to claim the affirmative defense, unless the owner or operator knowingly or intentionally falsified the information in the report;

(2) the periods of unauthorized emissions from any unplanned maintenance, startup, or shutdown activity could not have been prevented through planning and design;

(3) the unauthorized emissions from any unplanned maintenance, startup, or shutdown activity were not part of a recurring pattern indicative of inadequate design, operation, or maintenance;

(4) if the unauthorized emissions from any unplanned maintenance, startup, or shutdown activity were caused by a bypass of control equipment, the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;

(5) the facility and air pollution control equipment were operated in a manner consistent with good practices for minimizing emissions;

(6) the frequency and duration of operation in an unplanned maintenance, startup, or shutdown mode resulting in unauthorized emissions were minimized and all possible steps were taken to minimize the impact of the unauthorized emissions on ambient air quality;

(7) all emissions monitoring systems were kept in operation if possible;

(8) the owner or operator actions during the period of unauthorized emissions from any unplanned maintenance, startup, or shutdown activity were documented by contemporaneous operating logs or other relevant evidence; and

(9) unauthorized emissions did not cause or contribute to an exceedance of the NAAQS, PSD increments, or a condition of air pollution.

(d) Excess opacity events. Excess opacity events due to an upset that are subject to §101.201(e) of this title, or for other opacity events where there was no emissions event, are subject to an affirmative defense to all claims in enforcement actions for these events, other than claims for administrative technical orders and actions for injunctive relief, for which the owner or operator proves all of the following:

(1) the owner or operator complies with the requirements of §101.201 of this title. Failure to report information that does not impair the commission's ability to review the event, such as minor omissions or inaccuracies, will not result in enforcement action and loss of opportunity to claim the affirmative defense, unless the owner or operator knowingly or intentionally falsified the information in the report;

(2) the opacity was caused by a sudden, unavoidable breakdown of equipment or process beyond the control of the owner or operator;

(3) the opacity did not stem from any activity or event that could have been foreseen and avoided or planned for, and could not have been avoided by better operation and maintenance practices or by technically feasible design consistent with good engineering practice;

(4) the air pollution control equipment or processes were maintained and operated in a manner consistent with good practice for minimizing opacity;

(5) prompt action was taken to achieve compliance once the operator knew or should have known that applicable opacity limitations were being exceeded and any necessary repairs were made as expeditiously as practicable;

(6) the amount and duration of the opacity event and any bypass of pollution control equipment were minimized and all possible steps were taken to minimize the impact of the opacity on ambient air quality;

(7) all emission monitoring systems were kept in operation if possible;

(8) the owner or operator actions in response to the opacity event were documented by contemporaneous operation logs or other relevant evidence;

(9) the opacity event was not part of a frequent or recurring pattern indicative of inadequate design, operation, or maintenance; and

(10) the opacity event did not cause or contribute to a condition of air pollution.

(e) Opacity events resulting from unplanned maintenance, startup, or shutdown activity. Excess opacity events, or other opacity events where there was no emissions event, that result from an unplanned maintenance, startup, or shutdown activity that are determined not to be excessive are subject to an affirmative defense to all claims in enforcement actions brought for these activities, other than claims for administrative technical orders and actions for injunctive relief, for which the owner or operator proves the opacity resulted from an unplanned maintenance, startup, or shutdown activity, as defined in §101.1 of this title, and all of the following:

(1) for excess opacity events that result from a scheduled maintenance, startup, or shutdown activity, the owner or operator complies with the requirements of §101.211 of this title. For excess opacity events that result from an unscheduled maintenance, startup, and shutdown activity, the owner or operator complies with the requirements of §101.201 of this title and demonstrates that reporting pursuant to §101.211(a) of this title was not reasonably possible. Failure to report information that does not impair the commission's ability to review the event, such as minor omissions or inaccuracies, will not result in enforcement action and loss of opportunity to claim the affirmative defense, unless the owner or operator knowingly or intentionally falsified the information in the report;

(2) the opacity was caused by a sudden, unavoidable breakdown of equipment or process beyond the control of the owner or operator;

(3) the periods of opacity could not have been prevented through planning and design;

(4) the opacity was not part of a recurring pattern indicative of inadequate design, operation, or maintenance;

(5) if the opacity event was caused by a bypass of control equipment, the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;

(6) the facility and air pollution control equipment were operated in a manner consistent with good practices for minimizing opacity;

(7) the frequency and duration of operation in a startup or shutdown mode resulting in opacity were minimized;

(8) all emissions monitoring systems were kept in operation if possible;

(9) the owner or operator actions during the opacity event were documented by contemporaneous operating logs or other relevant evidence; and

(10) the opacity event did not cause or contribute to a condition of air pollution.

(f) Obligations. Subsections (b) - (e) and (h) of this section do not remove any obligations to comply with any other existing permit, rule, or order provisions that are applicable to an emissions event or a maintenance, startup, or shutdown activity. Any affirmative defense provided by subsections (b) - (e) and (h) applies only to violations of state implementation plan requirements. An affirmative defense cannot apply to violations of federally promulgated performance or technology based standards, such as those found in 40 Code of Federal Regulations Parts 60, 61, and 63. The affirmative defense is available only for emissions that have been reported or recorded.

(g) Frequent or recurring pattern. Evidence of any past event subject to subsections (b) - (e) of this section is admissible and relevant to demonstrate a frequent or recurring pattern of events, even if all of the criteria in that subsection are proven.

(h) Planned maintenance, startup, or shutdown activity. Unauthorized emissions or opacity events from a maintenance, startup, or shutdown activity that are not unplanned that have been reported or recorded in compliance with §101.211 of this title are subject to an affirmative defense to all claims in enforcement actions brought for these activities, other than claims for administrative technical orders and actions for injunctive relief, for which the owner or operator proves all of the criteria listed in subsection (c)(1) - (9) of this section for emissions, or subsection (e)(1) - (9) of this section for opacity events and the following:

(1) the owner or operator has filed an application to authorize the emissions or opacity by the following dates:

(A) for facilities in Standard Industrial Classification (SIC) code 2911 (Petroleum Refining), one year after the effective date of this section;

(B) for facilities in major group SIC code 28 (Chemicals and Allied Products), except SIC code 2895, two years after the effective date of this section;

(C) for facilities in SIC code 2895 (Carbon Black), four years after the effective date of this section;

(D) for facilities in SIC code 4911 (Electric Services), five years after the effective date of this section;

(E) for facilities in SIC codes 1311 (Crude Petroleum and Natural Gas), 1321 (Natural Gas Liquids), 4612 (Crude Petroleum Pipelines), 4613 (Refined Petroleum Pipelines), 4922 (Natural Gas Transmission), 4923 (Natural Gas Transmission and Distribution), six years after the effective date of this section; and

(F) for all other facilities, seven years after the effective date of this section.

(2) an owner or operator who filed an application listed in paragraph (1) of this subsection has provided prompt response for any requests by the executive director for information regarding that application.

(i) The affirmative defense in subsection (h) of this section will expire upon the earlier of one year after the application deadlines in subsection (h)(1)(A) and (C) - (F) of this section, or the issuance or denial of a permit applied for under subsection (h)(1)(A) and (C) - (F) of this section, or voidance of an application filed under subsection (h)(1)(A) and (C) - (F) of this section. The affirmative defense in subsection (h) of this section will expire upon the earlier of two years after the application deadline in subsection (h)(1)(B) of this section or the issuance or denial of a permit applied for under subsection (h)(1)(B) of this section, or voidance of an application filed under subsection (h)(1)(B) of this section. If the permit application remains pending after the affirmative defense expires, the commission will use enforcement discretion for all claims in enforcement actions brought for excess emissions from planned maintenance, startup, or shutdown activities, other than claims for administrative technical orders and actions for injunctive relief for which the owner or operator proves the criteria in subsections (c) and (e) of this section, until the issuance or denial of a permit applied for under subsection (h)(1) of this section, or voidance of an application filed under subsection (h)(1) of this section.

(j) The executive director shall process permit applications referenced in subsection (h) of this section in accordance with the schedule set out in §116.114 of this title (relating to Application Review Schedule).

(k) Federal court jurisdiction. Subsections (b) - (e) of this section are not intended to limit a federal court's jurisdiction or discretion to determine the appropriate remedy in an enforcement action.

(l) Delayed applicability. Subsection (k) of this section does not apply until all appeals regarding the United States Environmental Protection Agency's rulemaking entitled "State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA's SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls To Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction," published in the *Federal Register* on June 12, 2015, (SIP Call) as it applies to subsections (b) - (e) of this section, have ended, and there is a final and nonappealable court decision that upholds the SIP Call.